Volume 70

Volume 70

NO. 65-88.

IN THE

APPELLATE COURT OF ILLINOIS

FIFTH DISTRICT

NEIL BRADLEY and CLIFFORD B. BRADLEY, a Minor, by MAX BRADLEY, His Next Friend,	)	
Plaintiffs-Appellees,	)	Appeal from the Circuit Court of Randolph County.
vs.	)	Honorable James W. Gray, Judge Presiding.
NORMAN DuWAYNE BEISNER, JR.,	)	
Defendant-Appellant.	)	

Goldenhersh, P. J.

Defendant appeals from the judgments of the Circuit Court of Randolph County entered on jury verdicts finding for plaintiffs in an action for personal injuries, predicated on defendant's wilful and wanton misconduct, (Ch. 95 1/2, sec. 9-201, Ill. Rev. Stat. 1965). Defendant contends that the trial court erred in denying defendant's motions for directed verdicts, and that the verdicts are against the manifest weight of the evidence.

The evidence shows that shortly after 7:00 P. M. on October 6, 1962, plaintiffs, Neil Bradley and Clifford Bradley, then age 20 and 15, respectively, were passengers in

an automobile being driven by defendant, then age 17. Plaintiff, Neil Bradley, was riding in the front seat, sitting between defendant and another boy. Clifford and another passenger were riding in the rear seat.

The boys were going from Willisville, where all of them resided, to Evansville, where Neil was to play the saxophone with the orchestra at a dance which defendant and the other passengers in the car planned to attend. The trip from Willisville to Palestine was uneventful. In Palestine, defendant turned a corner at such speed as to cause the car to "whip around" and throw the passengers sideways. At that time, plaintiff, Neil Bradley, commented that defendant "liked to take the curves fast". The road over which defendant drove after leaving Palestine is oil surfaced and has chat or gravel on the shoulders. There are five curves in the road within 1.8 miles of Palestine, and defendant drove over the road and around the curves at a speed of 55 to 60 miles per hour.

Approximately 1.8 miles from Palestine, defendant was driving in a westerly direction. At that point the road on which he was driving makes a 90° turn to the north, and there is a rock surfaced road which continues on in a westerly direction. The testimony shows that as the automobile approached the intersection, defendant, driving with one hand, was attempting to adjust the car radio, that

plaintiff, Neil Bradley, volunteered to tune the radio to the station defendant wanted, Neil attempted to adjust the radio, that the radio light was out, that defendant switched on the dome light, that the automobile went into the above described curve at a speed between 55 and 60 miles per hour, went off the road into a ditch west of the southbound lane of the road, and overturned. Defendant testified that as he drove in a westerly direction he saw the headlights of an oncoming automobile with its bright lights on, that he dimmed his headlights but the oncoming car did not, that when the car was about 40 yards from what he now knows is the intersection, he saw the intersection for the first time, and realized that the road on which he was traveling made an abrupt turn to the right and proceeded in a northerly direction. He turned the automobile to the right toward the curve, the car slid on the loose rocks and gravel, and went into the ditch.

The Supreme Court of Illinois in Schneiderman v. Interstate Transit Lines, Inc., 394 Ill. 569, 583, 69 N. E. 2d 293, 300, said "A wilful or wanton injury must have been intentional or the act must have been committed under circumstances exhibiting a reckless disregard for the safety of others, such as a failure, after knowledge of impending danger, to exercise ordinary care to prevent it or a failure to discover the danger through recklessness or carelessness

when it could have been discovered by the exercise of ordinary care. (Citing cases) The question whether a personal injury has been inflicted by wilful or wanton conduct is a question of fact to be determined by the jury. Bernier v. Illinois Central Railroad Co. 296 Ill. 464."

In Wallace v. Radovick, 55 Ill. App. 2d 264, at page 266, this court said, "When considering the reversal of a jury verdict, this court is bound by a well-established rule of law that unless the verdict of the jury is manifestly and palpably against the weight of the evidence, it must stand. If there is substantial evidence supporting the verdict in the record, then a reviewing court is not justified in overruling the judgment of the jury as to the weight of such evidence or its probative value. (Citing cases) Another well-established rule of law is that in determining whether the verdict of the jury is against the manifest weight of the evidence and whether the evidence is sufficient to support the charge of wilful and wanton misconduct, the Appellate Court should consider only the evidence most favorable to the party who secured the verdict. (Citing cases)"

The record here shows that defendant drove at a speed of 55 to 60 miles per hour over a road containing many curves, in a manner which resulted in his automobile leaving the road

and overturning in a ditch.

Applying the rules enunciated in the above cited cases to the facts in this case, we cannot say that the jury was not justified in finding the defendant guilty of wilful and wanton misconduct. The judgment of the Circuit Court of Randolph County is affirmed.

Judgment Affirmed.

Concur: Hon. George J. Moran, J.

Concur: Hon. Edward C. Eberspacher, J.

Publish Abstract Only.

A

50638

PEOPLE OF THE STATE OF ILLINOIS,
Plaintiff-Appellee,
v.
JAMES SYLVESTER,
Defendant-Appellant.

APPEAL FROM
CIRCUIT COURT
COOK COUNTY
CRIMINAL DIVISION

MR. JUSTICE BURKE DELIVERED THE OPINION OF THE COURT:

In a bench trial for aggravated battery the defendant was found guilty of the lesser included crime of battery and sentenced to three months in the county jail. He appeals.

In the early morning of August 29,1964, defendant and Walter Kitt engaged in a fist fight resulting in Kitt's hospitalization for a period of at least one month for injuries sustained about the head. Defendant admitted having struck two or three blows before he was pulled away from Kitt by a mutual acquaintance, Henry Leasure, who happened by.

Chicago Police Officer John Henry testified that he was assigned to investigate the matter and that he attempted to interview Kitt at the County Hospital on at least 12 occasions, but was unable to have a conversation with Kitt at any time because Kitt was unable to speak. The officer located defendant through Henry Leasure and took a statement from defendant to the effect that defendant and Kitt engaged in the fight for the reason that Kitt had, a week to ten days earlier, hit defendant with a billy club, cutting his head and requiring five stitches. Defendant stated that he owed Kitt "a whippen" for the prior fight. Defendant refused to sign the statement, but it was admitted into evidence after defense counsel withdrew his objection to its admissibility.

Defendant testified in his own behalf and stated that he was "standing on a porch and he [Kitt] came through a gangway. He was walking toward me with his hands in his pocket. I jumped down

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and grabbed him and we started fighting. I hit him two or three times and he fell. I fell on top of him and we scuffled around for a while." On cross-examination, defendant testified that Kitt had a gun, that he said to Kitt: "I owe you a whippen," and that he then hit Kitt two or three times. The existence of a gun was testified to by no one other than defendant; Henry Leasure stated he saw no weapon at the scene of the incident.

During the hearing in aggravation and mitigation, defense counsel admitted that the fights between defendant and Kitt resulted from gambling. The trial judge at one point stated that he thought the sentence should be one month in the county jail and a fine of $50, but later sentenced defendant to three months in jail and no fine.

Defendant maintains that a reasonable doubt exists as to his guilt, or, in the event the finding of guilty is proper, that the extent of his punishment should be modified and reduced because allegedly improper and prejudicial facts were considered by the trial court in arriving at the sentence, resulting in a more severe sentence than the one first indicated by the court. We disagree.

Defendant's own testimony proves his guilt: as Kitt walked through the gangway defendant jumped from the porch and immediately engaged in a fist fight. Defendant argues that the evidence at trial shows he acted in self-defense, for the reason that he testified Kitt had a weapon. Defendant further argues that the statement given to the police officer should not have been admitted into evidence since the statement did not contain the matter of Kitt having a weapon, thereby negating his defense at trial of self-defense. However, defendant himself permitted the statement to go into evidence. Furthermore, even assuming a defense of self-defense was raised at the trial, defendant's own testimony again shows that he did not act in self-defense. Upon seeing Kitt walking through the gangway, defendant immediately assaulted him without any attempt to flee. On cross-examination, when the matter

concerning the gun was first brought out, defendant testified that he approached Kitt and stated to him that he owed him "a whippen" and that he proceeded to beat Kitt. Neither on direct examination nor cross-examination did defendant's testimony tend to prove that he acted in self-defense. The evidence shows, on the contrary, that the fight was the result of a grudge which defendant held against Kitt for the previous beating.

We are of the opinion that the sentence of three months in jail is in accord with the severity of defendant's actions, and that the sentence is not too severe and did not result from a consideration by the trial court of improper and prejudicial facts. It should be noted at this point that the maximum sentence for battery is six months in the county jail or a fine of $500, or both. Ill. Rev. Stat. 1963, Chap. 38, Par. 12-3. The victim here was severely beaten, and had to spend at least one month in the hospital. Whether the injuries were permanent or temporary is immaterial; the important fact is that defendant seriously injured Kitt in a grudge fight. As noted by the trial judge when he passed sentence, defendant "took the law into his own hands."

Defendant's contention that there was no evidence that Kitt's hospitalization resulted from the beating by the defendant is unfounded. Kitt's sister testified she saw him the day before the fight and that he was then in good health; defendant admitted striking Kitt several times and knocking him down; Henry Leasure testified that Kitt was unconscious after he intervened and broke up the fight; and Officer Henry testified that he was unable to converse with Kitt on at least a dozen occasions and that Kitt was still in the hospital a month after the fight. The strong inference is that Kitt's injuries and condition were the direct result of the beating by defendant.

The fact that the trial court first indicated a proper sentence would be one month in jail and a $50 fine does not necessarily mean that the final sentence of three months is too severe. The reason

given for the three months sentence was that defendant took the law into his own hands and that Kitt was severely beaten. The fact that the police officer stated that defendant earned a living by gambling, after the trial court indicated he thought the sentence should be one month and $50 and before the three months sentence was imposed, does not indicate defendant was in any way prejudiced. Prior to this testimony by the officer, defense counsel admitted several times that the fights in question were the result of gambling and even went so far as to state that the police officer would agree. Furthermore, defendant made no objection to the officer's statement. The case of People v. McWilliams, 348 Ill. 333, cited by defendant in support of his position, is clearly not in point. In the McWilliams case the defendant pleaded guilty but did not waive a hearing in aggravation and mitigation. The trial court heard evidence only in aggravation and sustained objections to evidence in mitigation. In the case at bar, on the other hand, defendant was given every opportunity to offer evidence in mitigation and in fact did so.

We think that the defendant had a fair trial of the issues and a fair hearing in aggravation and mitigation to determine the sentence.

The judgment is affirmed.

JUDGMENT AFFIRMED.

BRYANT, P.J., and LYONS, J., concur.

50660

LILLIAN RENNIE, Plaintiff-Appellee, v. LEO F. JACOEL, Defendant-Appellant.	)	APPEAL FROM CIRCUIT COURT COOK COUNTY

MR. JUSTICE BURKE DELIVERED THE OPINION OF THE COURT:

This appeal is taken from a judgment upon a verdict of $13,500 for plaintiff for injuries sustained as a result of an automobile mishap. Defendant maintains that he was not afforded a fair and impartial trial.

Plaintiff, a woman 80 years of age, was on foot crossing the intersection of Halsted and Grace Streets in Chicago. She testified that she was crossing Halsted Street from the east to the west on the south side of Grace Street, with the green light and inside the pedestrian crosswalk. When she reached a point a few feet from the western curbstone of Halsted Street, she was struck by defendant's automobile. She stated that she did not see the automobile before it struck her, and that it knocked her down and she "rolled across the street."

Defendant testified that he was proceeding in a westerly direction on Grace Street, and intended to turn south (or left) onto Halsted Street. He stopped at the intersection and waited for the eastbound traffic on Grace Street to clear before attempting his turn. He testified that as he was making his turn, plaintiff stepped off the west curbstone of Halsted Street directly into the path of his automobile, that he attempted to stop immediately, but that the right side of his automobile struck the plaintiff. Defendant further testified that plaintiff was south of, and not within, the pedestrian crosswalk when his automobile struck her.

Defense witness Martha Dunlap, an employee at the beauty salon located on the southeast corner of Halsted and Grace Streets, testified

that she was in the beauty salon when the accident occurred. She stated that plaintiff walked onto Halsted Street just as defendant attempted his left turn and that plaintiff was not in the crosswalk. Defense witness Diane Fishman Jacoel, defendant's fiancee at the time of the accident, was also employed at the beauty salon and testified that she saw the accident. Mrs. Jacoel stated that plaintiff stepped off the curb, south of the crosswalk, and was struck by the automobile. Louise Molnar, a defense witness and another employee at the beauty salon, stated that she saw plaintiff after the accident, that Mrs. Jacoel was possibly giving a manicure at the time of the accident, and that she, the witness, finished Mrs. Jacoel's customer after the accident.

Chicago Police Officer George Loftus investigated the accident and took a statement from defendant which defendant later read and signed, and which Diane Fishman Jacoel witnessed. The statement read that defendant was attempting a left hand turn, that he did not observe plaintiff until she was in front of his automobile, and that his automobile struck her and knocked her some 20 feet onto Halsted Street. On direct examination of the officer the statement was used to refresh his recollection of what defendant stated to him. On cross-examination, defendant moved to have the statement admitted into evidence, after having been admonished by the trial court that he had a right not to have the statement in evidence. The officer further testified on direct examination, of his own recollection, that a Chicago Fire Department ambulance was at the scene when he arrived and that he saw the firemen "picking plaintiff up near the southwest curb of Halsted and Grace Streets, a little out of the crosswalk." He also testified that he observed skid marks some 30 to 40 feet in length and that the automobile could have been traveling about 20 miles per hour.

Chicago Firemen Frank Boshold and Norman Shettko arrived at the scene in the ambulance. Fireman Boshold testified that defendant's

automobile was straddling the crosswalk, facing south, and that plaintiff was lying a few feet from the curbstone, "about 10 feet" or "approximately 15 feet" from defendant's automobile. He was not certain where plaintiff was lying in relation to the crosswalk, but "possibly a few feet away." Fireman Shettko testified that plaintiff was lying in the crosswalk, some 2 to 3 feet from the western curb of Halsted Street.

Medical testimony was offered at the trial to the effect that plaintiff had received 6 fractures in the left hip and lacerations about the head as a result of the accident. There was also testimony offered that plaintiff suffered from a preexisting condition, a spur formation in the fifth lumbar vertebra, which condition could have been aggravated by the injuries in the hip and which could be the cause of future pain and distress in the area, and that the condition is permanent.

Defendant's first contention is that the trial court improperly allowed Officer Loftus to testify from the statement signed by defendant. Defendant characterizes the information contained on the statement as hearsay, and therefore inadmissible. However, it must be borne in mind that defendant, after making the statement, read it and signed it and that his signature was witnessed by his fiancee. Such a statement constitutes an admission against interest which is allowable in evidence as an exception to the hearsay rule. Jacks v. Woodruff, 9 Ill. App.2d 224. Furthermore, the statement was not admitted into evidence until defense counsel, on cross-examination of Officer Loftus, moved for its admission, thereby waiving any question as to its admissibility. The case of Paliokaitis v. Checker Taxi Co., 324 Ill. App. 21, cited by defendant in support of his position is clearly not applicable. The statement taken from defendant in the Paliokaitis case was neither read nor signed by him; defendant there expressly refused to make a statement to the police, but merely told the police "in an offhand manner what had happened." The police report in the Paliokaitis case was clearly hearsay. In the case at bar, however, defendant read and

signed the report, rendering it an admission against interest, and further moved for its admission into evidence.

Defendant next maintains that the trial court arbitrarily restricted his cross-examination of four of plaintiff's witnesses. The record clearly shows this not to be the case, but on the contrary, the court was lenient with the cross-examination conducted by the defense. First, there was no inconsistency in the testimony given by Fireman Boshold on direct examination. He stated that defendant's automobile was "facing south, straddling the crosswalk, some 15 feet from the southwest corner." He did not say, as defendant maintains, that the automobile was "15 feet south of the crosswalk." Nor was the cross-examination curtailed when the court sustained an objection to defense counsel's question concerning the location of the crosswalk in relation to the corner of Halsted and Grace Streets. The questions of the defense in this regard confused the witness and defense counsel willingly followed the court's suggestion to use a photograph of the scene to aid the witness. After the witness stated he did not know how far the crosswalk was from the corner, the trial court sustained an objection to another question on the very same point. The cross-examination of Fireman Shettko was likewise not arbitrarily restricted. The fireman was questioned whether "it was true that plaintiff was lying 10 feet north or 10 feet south of the automobile" and the question was objected to. The objection was properly sustained for the reason that no such matter was brought out on direct examination, nor was any attempt made on cross-examination to determine where plaintiff was lying in relation to the automobile.

On the cross-examination of Officer Loftus, he testified that plaintiff was walking in a westerly direction, and that he recalled this from what defendant told him and what he had entered on his accident report and not from the statement signed by the defendant. The trial court clarified the distinction between the two reports. No objection

was made by the defense that the testimony of the officer was hearsay. The officer's testimony concerning the skid marks was from his own inspection of the street while at the scene. Further, there was no inconsistency between the officer's testimony that plaintiff was lying a few feet from the defendant's automobile, and his testimony that defendant told him he knocked plaintiff some 20 feet down the street. The trial court properly sustained plaintiff's objection to this line of questioning when it became apparent that the officer was testifying first, from his own observations, and second, as to what defendant had told him. Finally, it clearly does not appear that defense counsel was "forced to admit the signed statement into evidence." The record does not show that opposing counsel engaged in any underhanded tactics which forced defense counsel to have the statement admitted into evidence, as was the situation in the case of Bishop v. Chicago Junction Ry. Co., 289 Ill. 63, cited by defendant in support of this position.

The cross-examination of Doctor Zeitlin was in no way restricted. The questions asked by defendant on re-cross-examination, to which an objection was sustained, went to the same matters as were covered in the doctor's cross-examination. Furthermore, the causal connection between the accident and plaintiff's injuries was established on direct examination of the doctor; no speculation on the part of the jury as to the proximate cause was involved.

The next point raised by defendant is that the testimony of defense witness Mrs. Spear, that she did not see plaintiff struck by the automobile, differed substantially from the statement she made before trial, that she saw the accident; defendant maintains that the trial court erred in not allowing defendant to treat her as an adverse witness. No prejudicial error was committed, for the reason that defendant had adequate warning of what Mrs. Spear actually saw, or did not see, from the statement taken from her before the trial. In

the pre-trial statement Mrs. Spear stated that "I just saw she [plaintiff] was knocked down. I saw the car.... I just saw when she was knocked down. I don't know how far, but they saw the whole thing." Furthermore, the fact that Mrs. Spear knew the plaintiff for some 2 or 3 years before the trial does not cast doubt on her testimony, for the reason that Mrs. Spear testified that she did not talk to the plaintiff about the accident.

Defendant further contends that certain instructions were improperly given to the jury. His challenge of plaintiff's Instruction No. 11 is misplaced, because the instruction is supported by evidence in the record. Dr. Zeitlin testified concerning the question of the aggravation of preexisting injuries and the permanency of the injuries suffered as a result of the accident. There is also testimony on the question of the pain and suffering to be experienced by the plaintiff in the future due to the injuries. Defendant's challenge on plaintiff's Instruction No. 1 is likewise unavailing. He claims that the instruction should have limited the use of the statements used to impeach defendant's witnesses for that purpose only, but such an instruction should have been submitted by the defendant. Defendant's Instruction No. 1 was similar to I.P.I. 1.01, but sub-section 7 of I.P.I. 1.01, concerning the limitation of use of evidence, was omitted. A party cannot complain of failure to give an instruction which he himself has failed to offer. Woodruff v. Pennsylvania R. Co., 52 Ill. App.2d 341. Defendant further maintains that the trial court improperly refused his Instruction No. 15, concerning the impeachment of witnesses, which was not taken from I.P.I. I.P.I. 1.01(7) covered this matter and should have been included under defendant's Instruction No. 1. S. Ct. R. 25-1; Woodruff v. Pennsylvania R. Co., 52 Ill. App.2d 341.

The final point raised by defendant is that the trial court permitted plaintiff's counsel to engage in prejudicial final argument.

The record, however, does not so indicate. While it is true that plaintiff's counsel read from the statements which were used to impeach defendant's witnesses, no objection was made by defendant for some length of time. When an objection was made it was sustained and an admonition given by the trial judge. It does not appear that plaintiff's counsel thereafter attempted to read from the statements. Defendant also contends that the trial court erred in allowing plaintiff's counsel to argue concerning the truth of the matters contained in the impeachment statements. It is difficult to determine from the record whether plaintiff was using the statements to go to the truth of the matter contained therein or simply to challenge the credibility of the witnesses. Nevertheless, no objection was made by the defendant to this line of argument and defendant cannot now be heard to complain. Defendant maintains that plaintiff, in challenging the credibility of defense witness Mrs. Dunlap, argued facts not in the record. The statement attributed to Mrs. Dunlap by plaintiff's counsel was taken from her testimony at the trial.

The other points raised by defendant have been considered and found to be without merit.

The judgment is affirmed.

JUDGMENT AFFIRMED.

BRYANT, P.J., and LYONS, J., concur.

50957

BEVERLY LESLIE TAYLOR,
Plaintiff-Appellant,
v.
ROBERT TAYLOR,
Defendant-Appellee.

APPEAL FROM THE
CIRCUIT COURT OF
COOK COUNTY.

MR. JUSTICE LYONS DELIVERED THE OPINION OF THE COURT:

This is an appeal by plaintiff from a final order entered in the Circuit Court of Cook County modifying a decree for divorce previously entered.

Plaintiff and defendant were married in March, 1962 and had no children. Approximately two years later, plaintiff filed her complaint for divorce alleging extreme and repeated cruelty. Defendant filed a pro se appearance, but no answer. The parties entered into a written agreement to have the complaint for divorce heard as an uncontested matter; that plaintiff resume her maiden name; that defendant pay $400.00 attorney fees; that plaintiff be awarded the household furniture then in her possession; and that the defendant "pay to plaintiff, in lieu of permanent alimony, the sum of $100.00 per month, commencing February 25, 1964 and on the 25th day of each month until the sum of $6,000.00 has been paid in full." This agreement was identified by plaintiff and filed as a part of the Report of Proceedings. The Court entered a decree in compliance therewith. Defendant made his first six payments. Plaintiff remarried on September 4, 1964. The last payment was made in August, 1964.

Plaintiff filed a petition in May, 1965, alleging the decree, the refusal of the defendant to comply therewith, alleging a balance due of $5,400.00 and praying for a rule to show cause. Defendant filed an answer and cross petition alleging that the attorney for plaintiff was his attorney; that he understood he was to pay alimony until plaintiff remarried, or until $6,000.00 shall have been paid; that he signed a pro se appearance and the stipulation reflecting his oral agreement; that the decree for divorce was entered without any notice or approval by him;

that plaintiff remarried in September, 1964, and that he and plaintiff had orally agreed that he did not owe any more money, that no demand was made on him for payment until this petition was filed; and that both he and plaintiff understood that since she was remarried, she could not collect alimony from him, that his attorney did not advise him that he was to pay $6,000.00 in gross. Defendant prayed that the petition for rule be denied and the decree be modified to show that he should pay $100.00 per month alimony until plaintiff should remarry or until $6,000.00 was paid, whichever came first, and the alimony be terminated as to date of the remarriage.

Plaintiff filed a reply denying that Mr. Gomberg was the attorney for Mr. Taylor, denying that there was an understanding that the $100.00 payments would cease if the plaintiff should remarry and alleging that a copy of the agreement was given to defendant and a certified copy of the decree was delivered to him and that for a long time, plaintiff did not know the whereabouts of defendant, although she attempted to locate him.

At the hearing on the petition of plaintiff, the answer and cross petition of defendant and the reply of plaintiff, the court heard the testimony of plaintiff and defendant only and made a statement that in his opinion the decree did not comply with the agreement which had been changed by interlineations, that defendant was entitled to notice of the signing of the decree and that alimony should cease upon remarriage, and entered an order on July 1, 1965, "that the portion of the Property Settlement Agreement of the parties known as paragraph 2, which reads 'that defendant shall pay to the plaintiff, as and for permanent alimony, the sum of $100.00 per month, . . . until the sum of $6,000.00 has been paid in full,' is an agreement for the payment of permanent alimony and not alimony in gross nor a settlement in lieu of alimony and therefore is terminable upon plaintiff's remarriage . . ."

and ordering that the petition for a rule to show cause is denied, that the petition for a rule to show cause is denied that the decree that the decree that the decree be modified by the addition of the words, "or until was modified by adding the words "or until plaintiff shall remarry" and that the obligation of defendant to pay that the obligation of defendant to pay alimony is terminated. This alimony be terminated. This appeal is from that order. appeal is from that order.

The theory of plaintiff is that the original decree was a settlement in gross to be paid in installments over a period of sixty months, and therefore, although remarried, plaintiff was still entitled to receive all of said sixty installments.

At the outset, plaintiff has appeared in this court and has complied with all the statutory requirements and rules of this court. Defendant, however, has failed to file an appearance or brief. Under such circumstances the judgment may be reversed without a consideration of the cause on its merits. Eichelberger v. Robinson, 233 Ill. App. 579 (1924); C.I.T. Corporation v. Blackwell, 281 Ill. App. 504 (1935); 541 Briar Place Corporation v. Harman, 46 Ill. App.2d 1, 196 N.E.2d 498 (1964); Ogradney v. Richard J. Daley, Mayor, 60 Ill. App.2d 82, 208 N.E.2d 323 (1965); Oak Park National Bank v. Montanelli, No. M-50395, filed January 27, 1966; Mutual v. Nelson, No. 50732, filed February 19, 1966.

Furthermore, an examination of the law applicable to defendant's position reveals that plaintiff's contention on the merits of this case, is correct. See Whitney v. Whitney, 15 Ill. App.2d 425, 146 N.E.2d 800 (1957). The order is reversed and cause remanded with directions to enter an order denying defendant's prayer to modify the decree and for further proceedings consistent with these views.

ORDER REVERSED AND CAUSE
REMANDED WITH DIRECTIONS.

BRYANT, P.J., and BURKE, J., concur.

page 3 from Court per letter 6-17-66

Filed May 9, 1966
Released

Abstract

A

STATE OF ILLINOIS

APPELLATE COURT

FOURTH DISTRICT

General No. 10675 Agenda No. 6

Betty Pickett,
Plaintiff-Appellant
vs.
Anne Sodaro and Louis Sodaro,
Defendants-Appellees

Appeal from
Circuit Court
Sangamon County

TRAPP, P. J.

This cause came before us in Case No. 10609 on appeal from an order of July 13, 1964, allowing a motion to dismiss a complaint. This Court, on March 3, 1965, of its own motion, dismissed the appeal upon the ground that there was no final judgment before it.

Motions in regard to the matter have been presented to several judges and accordingly, a description of the events leading to the present state of the record is aided by the use of the name of the particular judge in reference to the specific proceeding.

On April 14, 1965, subsequent to our dismissal of the appeal, Judge Verticchio denied a motion to file a second amended complaint and expanded the previous dismissal of the amended complaint entered July 13, 1964, to read as follows:

> " Motion to dismiss cause comes on for determination. Motion allowed. Cause dismissed. Issues found in favor of defendant and against the plaintiff. It is therefore, ordered, adjudged and decreed by the Court that the plaintiff take nothing and the defendant go hence without day and plaintiff pay the costs."

This judgment is before us on the present appeal.

Other matters appearing of record, with reference to which various contentions of finality or lack of it are made, are as follows:

On May 21, 1964, Judge Douglass had entered an order allowing a motion to dismiss the original complaint. On May 28, 1964, Judge Douglass granted plaintiff leave to file an amended complaint. On May 28, 1964, the amended complaint was filed. On June 8, 1964, a motion to dismiss the amended complaint was filed. On June 23, 1964, the motion to dismiss the amended complaint was set before Judge Smith. On July 13, 1964, Judge Smith entered the order dismissing the amended complaint hereinbefore referred to. On April 14, 1965, the order of July 13, 1964, was amended as above set forth. On June 11, 1965, a motion was presented to Judge Douglass to amend the order of May 21, 1964, to a final judgment nunc

pro tunc and it was so ordered. This order was subsequently vacated by Judge Douglass on June 30, 1965. On July 16, 1965, a motion was presented to Judge Verticchio to amend the order of May 21, 1964, and this motion was denied.

The present appeal was initiated by notice of appeal dated June 10, 1965.

Since this Court, on the previous appeal, held that the order of July 13, 1964, was not final and appealable, it is obvious that the order of May 21, 1964, was not a final order. Furthermore, Judge Douglass, by the order of May 28, 1964, granting plaintiff leave to file an amended complaint, made it clear that the order of May 21, 1964, was not a final order. Accordingly, Judge Douglass properly vacated the nunc pro tunc order of June 11, 1965, by his order of June 30, 1965, and Judge Verticchio properly refused to amend the order of May 21, 1964, nunc pro tunc.

Additionally, there having been no final judgment in this cause until the order of Judge Verticchio on April 14, 1965, it would have been wholly improper to enter a nunc pro tunc order which would finalize an earlier order to the extent of depriving the plaintiff of a right of appeal.

The amended complaint sets forth in substance that plaintiff deposited Three Thousand Dollars ($3,000.00), to apply on the purchase price of certain real estate being purchased under verbal contract with the defendants, that there-

after the parties agreed not to proceed with the contract and agreed that the Three Thousand Dollars ($3,000.00) would be refunded, that defendants attempted to satisfy this agreement with a check for Two Thousand Two Hundred Dollars ($2,200.00), endorsed "down payment return in full as agreed", and that plaintiff refused to accept this amount in full settlement. Plaintiff sued for Three Thousand Dollars ($3,000.00).

Defendants' motion to dismiss contends that the complaint does not state a cause of action and made reference to the Statute of Frauds. Defendants' motion to the amended complaint is less definite. Defendants' brief is confined entirely to a claim that plaintiff should not have been allowed to file an amended complaint.

It is sufficient to say that defendants are in no position to complain of the order of May 28, 1964, allowing the filing of the amended complaint.

The fact situation stated by the amended complaint is sufficiently simple and common that detailed analysis is unnecessary.

As stated in the complaint, there was a verbal contract which neither vendor nor vendee desired to complete. There was no default on the part of vendee nor detriment incurred by vendor. A deposit was made and the parties agreed to refund it.

This general situation is discussed in 49 Am. Jur. Statute of Frauds, Sec. 563 (p. 868) as follows:

> ...."While, as a general rule, if the vendor is ready, willing, and able to carry out the contract on his part, the vendee cannot by repudiating the contract recover the purchase money which he has advanced, it is settled practically without dispute that the purchaser of land or an interest therein under a contract which does not satisfy the statute of frauds may recover, as upon an implied promise, the amount which he has paid as a deposit, or upon the purchase price, where the vendor without fault on the part of the vendee, is unable or refuses to perform the contract by conveying such title or interest as the contract calls for. The rule applies whether the statute, like sec. 4 of the original English statute of frauds, declares that no action shall be brought upon the agreement or whether it declares the oral agreement to be void. It would be unjust and inequitable to permit the vendor to retake possession of the property without repaying the purchase money paid to him. If he is allowed to retain both the land and the money paid therefor, he would in effect be allowed to invoke the aid of the statute to perpetrate a fraud. Although a previous demand on the part of the purchaser is usually essential to his recovery, where such a demand would clearly be of no effect it is not necessary that it be made." (Emphasis added)

See also Nelson v. Fricke, 335 Ill. App. 273, 276; 81 N.E. 2d 763; Falls v. Visser, 250 Ill. App. 481, 485; Ryan v. Schoenberger, 224 Ill. App. 308, 311; Baston v. Clifford, 68 Ill. 67; Smith v. Treat, 234 Ill. 552, 558; 85 N.E. 289; Bergtold v. Worthy, 182 Ill. App. 379, 380.

We hold that the amended complaint states a cause of action. The judgment dismissing the amended complaint should be reversed and the cause remanded for further proceedings not inconsistent with the views expressed herein.

REVERSED and REMANDED
WITH DIRECTIONS

SMITH and CRAVEN, JJ., concur.

50384

PEOPLE OF THE STATE OF ILLINOIS,	)	
	)	
Plaintiff-Appellee,	)	APPEAL FROM THE CIRCUIT
	)	
v.	)	COURT OF COOK COUNTY,
	)	
WILLIE KNIGHT,	)	CRIMINAL DIVISION.
	)	
Defendant-Appellant.	)	

MR. PRESIDING JUSTICE SULLIVAN DELIVERED THE OPINION OF THE COURT.

This is an appeal from a judgment of guilty on a charge of robbery for which the defendant was sentenced to the Illinois State Penitentiary for a term of 1 to 4 years. The case was tried by the judge, a jury having been waived.

The defendant raises only the point that the indictment was insufficient in that it did not state the time and place of the offense as definitely as could be done, as required by Illinois Revised Statutes, 1963, chap. 38, sec. 111-3(a) (4). The indictment returned in this case read as follows:

> "State of Illinois
> County of Cook--ss.
>
> In November, 1964, Grand Jury of the Circuit Court of Cook County.
>
> The grand Jurors chosen, selected, and sworn, in and for the County of Cook in the State of Illinois, in the name and by the authority of the People of the State of Illinois, upon their oaths present that on November 13, 1964 at and within said county Willie Knight committed the offense of robbery in that he, by the use of force, and while armed with a dangerous weapon, took forty dollars in United States currency from the person and presence of Tolman Hurt, in violation of Chapter 38, Section 18-2, of the Illinois Revised Statutes, 1963, contrary to the Statute, and against the peace and dignity of the same People of the State of Illinois.
>
> Daniel P. Ward
> State's Attorney."

At the close of all of the evidence the defendant made an oral motion for a new trial and an oral motion in arrest of judgment, both of which were denied.

Section 111-3(a) as it existed at the time of this offense provided as follows:

"A charge shall be in writing and allege the commission of an offense by:

(1) Stating the name of the offense;
(2) Citing the statutory provision alleged to have been violated;
(3) Setting forth the nature and elements of the offense charged;
(4) Stating the time and place of the offense as definitely as can be done;
* * *"

The defendant contends that the indictment did not state specifically either when or where the offense allegedly occurred, but only alleged that it occurred on a certain date in a certain county.

The cases of People v. Petropoulos, 59 Ill. App. 2d 298, 208 N.E.2d 323, affirmed by the Supreme Court in People v. Petropoulos, 34 Ill. 2d 179 , and People v. Blanchett, 33 Ill. 2d 527, 212 N.E.2d 97, are dispositive of the question raised by the defendant.

The question presented in both the Petropoulos and Blanchett cases, supra, was whether the information (Blanchett case), or indictment (Petropoulos case), which failed to state the time and place other than by date and county, was so defective that it did not charge an offense and therefore could be raised by motion in arrest of judgment. In the case before us the same question is raised.

In the Blanchett case, supra, the Supreme Court on page 533, in referring to the comments of the committee which drafted the new Criminal Code, said the following:

"The committee notes that the function of an indictment or information is to advise the accused of the nature and cause of the accusation against him and points out that the requirements set forth in section 111-3 cover all situations and will satisfy the constitutional requirement. The constitutional requirement is satisfied if the indictment alleges the commission of the offense within the county. In view of the expressed purpose of the Code to

> secure simplicity in procedure, (Ill. Rev. Stat. 1963, chap. 38, par. 101-1(a),) and to do away with pleading technicalities * * *, we believe that the language in section 111-3(a) (4) was not intended to change the former rule and require a more precise description of the time and place of the occurrence in order to charge an offense."

The Supreme Court in the same case concluded that the statute recognized that the time and place of the offense are separate and distinct from "the nature and elements of the offense," and that a fair reading of section 116-2, allowing a motion in arrest of judgment when the "indictment, information or complaint does not charge an offense," and section 114-1(b) precluding the waiver of the objection that "the charge does not state an offense," indicated that they refer to the failure to allege "the nature and elements of the offense" (sec. 111-3(a)(3)) and not to the time and place of the occurrence.

It was also decided in the Blanchett case, supra, that while a bill of particulars cannot be used to cure a void charge, that procedure is available for the protection of the defendant in a case such as this.

The indictment in this case was sufficient to allege the offense charged, and while the defendant would have been entitled to a bill of particulars, the trial court properly denied the motion in arrest of judgment.

The State in its brief argues that an oral motion in arrest of judgment, which is merely perfunctory, will not preserve an issue on appeal where the alleged defect was not raised or argued in the trial court. Since we have concluded that the indictment was sufficient and that a motion in arrest of judgment would be of no avail, we need not discuss this point.

Judgment affirmed.

Schwartz and Dempsey, JJ., concur.

Abstract only.

ed May 9, 1966
(Librarian)

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General No. M-10693 Agenda No. 66-4

STATE OF ILLINOIS

IN THE APPELLATE COURT

FOURTH DISTRICT

Richard G. Fritz,	:	
Plaintiff-Appellee	:	Appeal from
vs.	:	Circuit Court
Donald Bess,	:	Macon County
Defendant-Appellant	:	

Smith, J.

The cars of plaintiff and defendant collided in the parking lot of Caterpillar Tractor Company in Decatur about 7 a.m. as the parties were reporting for work. In a trial before a magistrate, without a jury, plaintiff was awarded judgment, both on his suit to recover damage to his car and on defendant's counter-claim against him for damages. Defendant appeals and contends that plaintiff was negligent, that defendant wasn't, and hence the wrong party is in the winner's circle. Stipulated damages to plaintiff's car were $460.17 and to the defendant's $189.39. The sole issue is whether the judgments are against the manifest weight of the evidence.

The accident occurred in a parking lot with no traffic controls other than a 10 mph posted speed limit and appropriately

marked "in" and "out" intersecting lanes. Plaintiff was driving south in an "out" lane - defendant was proceeding west in an "in" lane. The collision occurred in the southwest quadrant of the intersection. Plaintiff's car laid down some 60-70 feet of skid marks after the collision. Neither driver saw the other in time to avoid the accident. Defendant testified to his speed of 5 mph and to 30-35 mph for the plaintiff. Plaintiff admitted a speed of about 15 mph. In view of the physical facts, the testimony of neither as to speed is very conclusive.

Defendant testified under C.P.A. 60 (Ill. Rev. Stat. 1963, ch. 110, Sec. 60) as an adverse witness that he estimated his speed at 5 mph; that his car had only proceeded approximately three car lengths after making a left-hand turn into the cross lane from the entrance lane of the parking lot; that he did not see the plaintiff's car approaching until a fraction of a second prior to the collision and was unable to react quickly enough to reduce the speed or stop his vehicle; that the front portion of his automobile struck the left rear portion of the automobile being operated by the plaintiff; that he looked to the right and left prior to entering into the intersection and did not see the Fritz car; but that his view was partially blocked by the cars parked on the northeast corner of the intersection; that as he crossed the intersection, he was looking to his left in a southwesterly direction, where he usually parked, and at pedestrians who were crossing at the intersection; that if he had looked to the right after entering the intersection, he could have seen for a distance of approximately one hundred feet;that although the rear of his

car came to a stop within approximately 5 feet of the collision point, there were no skid marks visible; that the other parking lot on the company premises was approximately 3/8th's of a mile from this lot; that the damage to defendant's vehicle consisted primarily of a shearing off of the protruding portion on the front of the vehicle, lights, front of hood, etc.; that the approximate width of the cross lane on which he was traveling was some 25 feet and that of the exit lane on which plaintiff was traveling was some 30 feet; and that there were no traffic control signals at the intersection.

Plaintiff testified his speed was 15 mph; that he saw the car being driven by the defendant, Donald Bess, only a fraction of a second prior to the collision; that he was not able to make an attempt to reduce the speed of his automobile; that subsequently to and in consequence of the collision, the car being driven by the plaintiff skidded sideways in a long curve in a southerly direction, finally striking two cars parked on the east side of the exit lane, pushing one of the cars in an easterly direction into a third car, and coming to rest against the second car. The striking of the Fritz car by the Bess car knocked Fritz across the front seat to the right side of the Fritz car, with his left hand holding onto the steering wheel.

Defendant has taken his speed at 5 mph and plaintiff's at 15 mph and by mathematical deductions concludes that defendant entered the intersection first and thus places responsibility

on the plaintiff. It is apparent that the trial court did not accept this version of the facts nor was he required to do so. The plaintiff had almost cleared the intersection. His car, struck near the left rear, spun around, skidded sideways in a long curve against the tread and laid down said marks of 60 - 70 feet in length. It is apparent that the blow to his car came from a car traveling more than 5 mph. It is apparent that defendant at a blind intersection did not look after he entered the intersection and did not see what was clearly visible by his own testimony for a distance of 100 feet. It is patent that he simply paid no attention to traffic coming from his right. He was looking in a southwesterly direction toward pedestrians and the place where he intended to park. Either he approached the intersection too fast to see, or, if slow, simply paid no attention to any traffic from the right. Clearly the finding of the trial court that he was negligent is not against the manifest weight of the evidence.

As to the conduct of the plaintiff, we would observe that he had almost cleared the west side of the intersection and that he was approaching it from defendant's right. While it may well be doubted whether our statute governing right of way at intersections properly applies to traffic controls in a private parking lot, we think that it establishes a standard which does lend some color to the drivers' conduct. While it is clear that neither driver saw the other before the accident, the reason for this as to the defendant is clear while the reason as to the plaintiff is clouded. If the trial court

reasonably believed that the speed factors were different than the appellant has assumed - and the credibility and demeanor of the witness does have a bearing on this - we cannot say that his findings and the inferences drawn therefrom are manifestly against the weight of the evidence or that an opposite conclusion is clearly evident. Izzo v. Zera, 57 Ill. App. 2d 263, 205 N.E. 2d 644; Hinrichs v. Gummow, 41 Ill. App. 2d 428, 190 N.E. 2d 610.

In reaching this conclusion, we adhere to the long established rule that the conclusion of the trial court on question of fact is entitled to the same weight as the verdict of the jury; that we should not substitute our judgment for that of the trial court where credibility of witness is involved unless manifestly against the weight of the evidence; and that in search for truth, there are many considerations which a printed record cannot portray adequately. Johnson v. Fulkerson, 12 Ill. 2d 69, 145 N.E. 2d 31.

The judgment of the trial court is affirmed.

Affirmed.

Trapp, P.J. and Craven, J. concur.

49994

PEOPLE OF THE STATE OF ILLINOIS,
Plaintiff-Appellee,
v.
JOHN ADAMS (Impleaded),
Defendant-Appellant.

APPEAL FROM THE CIRCUIT COURT OF COOK COUNTY.

MR. PRESIDING JUSTICE BRYANT DELIVERED THE OPINION OF THE COURT:

This appeal comes from a judgment entered April 9, 1964 in the Circuit Court of Cook County following the return of a jury verdict finding the defendant guilty of the crime of theft. Ill. Rev. Stat. 1963, Ch. 38, Sec. 16-1. The jury further found that the value of the property stolen to be in excess of $150.00. The appellant urges as grounds for reversal on this appeal that the People failed to prove ownership of the property as alleged in the indictment and also that the People failed to prove the fair market value of the property to be more than $150.00.

According to the evidence adduced at the trial, Kassner's California Shop at 7560 North Western Avenue had reported difficulty to the police concerning merchandise disappearing. On April 19, 1963 two police officers, Richard Joyce and Duane Ytsen were stationed in the store pursuant to the complaint made to the police. They were dressed in street clothes and were posing as customers. At approximately 5:00 p.m. the appellant was observed to enter the store in the company of a friend who was carrying a black satchel.

These two men were seen to talk to a clerk and then walk to the rear of the store where men's suits were hung. Officer Ytsen said he was observing the two men at this time and that he saw them take some suits from the clothing racks and put them in the bag held by the appellant's companion. These men then left the store and both were apprehended by the police outside.

The appellant and his companion were indicted together and the indictment reads that, "they, knowingly obtained unauthorized

control over three suits, of the value of more than one hundred fifty dollars, the property of Max Kassner and Elsa Kassner, copartners, doing business as Kassner's California Shops, intending to deprive said Max Kassner and said Elsa Kanner [sic], copartners as aforesaid, permanently of the use and benefit of said property."

The appellant argues that there was no proof to show that the suits belonged to the Kassners as copartners. A witness, Max Turner, testified that at the time of the theft, he was the manager of the store from which the suits were taken. This witness was asked if the store was owned as a partnership by the Kassners. He replied that, "They jointly own the establishments." There was an objection to the witness being led by the form of the question as first posed. The question was rephrased and there was no objection either to the question or to the answer. There was no objection to the capabilities of this witness to testify to the ownership of the store.

The appellant urges that the phrase "jointly owned" is not specific enough to show that the ownership of the suits was in the partnership. It is argued that joint ownership can be used to cover a corporation or a joint stock association. We cannot agree with this contention. We think that the phrase "jointly owned" is sufficient to support an indictment alleging ownership in a partnership. (The testimony given by this witness in no way contradicts the indictment.)

The second point raised by the appellant is that there was insufficient proof that the suits taken had a value of more than $150.00. Turner testified that the suits had a combined retail value of $273.00. He also testified that none of the suits had been on the rack for more than three months. The appellant argues that the retail price is not sufficient evidence of the fair market value. As authority for this proposition he cites People v. Fognini, 374 Ill. 161, 28 N.E.2d 95 (1940). In that case the court noted that the suits had been in the

company's stock for three and a half years, were "old stock" and were "shop worn." They were described as being completely out of style. Such facts are not present in this case. There was absolutely no showing that the suits in question were not perfectly merchantable. The appellant has speculated that they might not be able to be sold. We cannot speculate in such a manner. The testimony is that the retail value of these suits totaled $273.00. The jury found that the value of the property exceeded $150.00. There is no evidence to the contrary, and this being so we have no basis for setting aside the jury's finding.

For the above reasons, the judgment of the Circuit Court is affirmed.

JUDGMENT AFFIRMED.

LYONS, J., and BURKE, J., concur.

50551

ROBERT JONES, Plaintiff-Appellant, v. JOSEPH REUSS, doing business as J & J SERVICE STATION, Defendant-Appellee.	)	APPEAL FROM THE CIRCUIT COURT OF COOK COUNTY.

MR. JUSTICE SCHWARTZ DELIVERED THE OPINION OF THE COURT.

Plaintiff brought an action in the Circuit Court of Cook County to recover for personal injuries allegedly suffered on defendant's premises. Plaintiff twice failed to comply with orders to produce his income tax returns, and on petition of the defendant the case was disposed of by an order holding that the plaintiff's complaint be dismissed, that plaintiff take nothing by the action, that defendants be found not guilty and that costs be assessed against the plaintiff. Plaintiff did not appeal, but filed a petition which was treated as a petition pursuant to Section 72 of the Civil Practice Act. When the petition was denied, another petition under Section 72 was filed, and denial of that petition was upheld by this court on appeal on the ground of res judicata. Jones v. Reuss, 47 Ill. App. 2d 212, 197 N.E.2d 709. (Petition for leave to appeal denied by the Supreme Court on September 28, 1964.) Before disposition of that case on appeal, the present action, identical in substance to the one brought in the Circuit Court, was brought in the then Village Court of Skokie (which later became part of the Circuit Court of Cook County). A motion to dismiss this action was granted on the ground that it was barred by the judgment order entered in the prior action, and from the judgment of dismissal this appeal was taken.

Plaintiff contends that the order of dismissal in the

first action was not a judgment on the merits which would bar his present action, but was rather an involuntary nonsuit, which would permit maintenance of this action under the terms of the Limitation Act. Ill. Rev. Stat., ch. 83, § 24a (1963). He concedes that the order appears to be a final judgment on the merits, but argues that defendant's petition in the first case had prayed for an order striking the complaint and dismissing the lawsuit and that "based on the Petition and Notice, and the first sentence of the order, the Court can and should treat the balance of the order as surplusage." Plaintiff urges that public policy favors a trial on the merits. The right to such a trial also depends on a party's compliance with the rules and orders of the court. In the instant case the plaintiff twice failed to comply with orders that he permit examination of his income tax returns.

Long accepted principles of judicial administration dictate that a judgment which is regular on its face is binding as it stands. The only question as to its validity that may be raised in a separate, subsequent proceeding is whether the court which entered the judgment had jurisdiction. No question is raised as to this. It is high time that this lawsuit be finally determined.

Judgment affirmed.

Sullivan, P.J., and Dempsey, J., concur.

Abstract only.

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NO. 65-48.

IN THE

APPELLATE COURT OF ILLINOIS

FIFTH DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,	)	
Plaintiff-Appellee,	)	Appeal from the Circuit Court of
vs.	)	Shelby County.
MARY JANE SPEARS,	)	
Defendant-Appellant.	)	Honorable Raymond O. Horn, Judge Presiding.

Crebs, J.

The defendant was indicted for the crime of burglary, based upon an alleged unauthorized entry of the house of Thelma Curry in Strasburg, Illinois, on March 30, 1964 with intent to commit theft. The case was tried before the Court without a jury and resulted in a verdict and judgment of guilty. Defendant's post trial motions were overruled and an appeal was taken to the Supreme Court based on an alleged denial of several constitutional rights. The Supreme Court found that no substantial constitutional issue was presented and transferred the cause to this Court.

Defendant next raises a number of objections to the

sufficiency of the evidence. A short review of the evidence is necessary. Thelma Curry testified for the People that she owned the house and furniture in question and did not give defendant permission to enter the house or take the furniture. There was no testimony in the case to the contrary. Then, several witnesses for the People testified to seeing the defendant enter said house on March 30 and remove articles of furniture. Defendant denied being at the premises on March 30 and her witnesses testified to an alibi. There was a direct conflict in testimony on whether or not defendant entered the house on March 30 and took the items of furniture. The trial Court, as shown by its verdict, believed the testimony of the People's witnesses and found the testimony of defendant and her alibi witnesses to be false. It is the duty of the trier of the facts to determine the credibility of the witnesses. There is nothing in the Record to indicate that this duty was not properly performed.

Defendant also objected to the admission of rebuttal testimony that the boy with defendant on March 30 was Carl Nave on the grounds that it was not proper rebuttal. Carl Nave had previously testified for the defense in the chain of alibi testimony that he was in Decatur the entire day of March 30. Testimony that he was at the Curry house in Strasburg on that date was competent in rebuttal.

In her amended post trial motion defendant sought a

new trial based on newly discovered evidence. The alleged newly discovered evidence is contained in affidavits by defendant and one Maurice E. Curry. Defendant's affidavit, in addition to various inconsistencies with her testimony at the trial, states that she "made no oral statement that she desired a trial by the Court". and further states, "she still wanted a jury trial and would have asked for it if the Court had given her the opportunity to do so by advising her of her rights." The Record shows these statements to be false.

The affidavit of Maurice E. Curry is inconsistent in many details with the defendant's testimony at the trial. It states that he saw defendant in Strasburg,March 14, arranged to return and meet her the following week, returned and sold her $4.00 worth of furniture, which belonged to his wife, agreed she could return and take more furniture for which she was to pay him later, that he gave defendant an assumed name and didn't give her his address. The statements in this affidavit are improbable. His subsequent failure to check up and see if any money was due him, and defendant's subsequent denial of entry on March 30, and her denial of taking any other articles of furniture, constitute actions inconsistent with the statements in the Curry affidavit.

Applications for new trials on the grounds of newly discovered evidence are not regarded with favor and must be closely scrutinized. The evidence must appear to be of such

conclusive character that it will probably change the result if a new trial is granted. People v.Dukes, 19 Ill. 2d 532, 169 NE 2d 84. Denial of the motion for a new trial was not error.

Defendant also filed a Motion in this Court which was taken with the case. Attached to this Motion are affidavits of defendant and her brother-in-law, Donald C. Spears, Defendant's affidavit contains discrepancies with her testimony. In the affidavit of Donald C. Spears, he makes statements as to matters occurring in 1965 and then states he informed defendant's trial counsel of these facts and offered to testify to them at her trial. The trial occurred in 1964. Further, his alleged evidence as to the use of his blue 1949 Ford pickup on March 30, 1964 is stated as a conclusion without any supporting facts. Under these circumstances the Motion taken with the case is denied.

In view of defendant's contention, both in the Supreme Court and in this Court, that her trial counsel so improperly represented her as to constitute a denial of due process of law, we have further considered this objection. While the fact that she chose her own counsel ordinarily disposes of this objection, in fairness to counsel, we wish to state that an examination of the Record shows that she was competently represented by her trial counsel.

JUDGMENT AFFIRMED

Concur: Hon. George J. Moran, J.

Concur: Hon. Joseph H. Goldenhersh, P. J.

Publish Abstract Only

Filed May 16, 1966

70 I.A. 481

Case No. 65-82

In The

APPELLATE COURT OF ILLINOIS

Third District

A.D. 1966

EVELYN M. KING, an Adult, and SUSAN MARIE KING, JOHN EDWARD KING, PAUL JOSEPH KING and DAVID ALAN KING, minors,
PLAINTIFFS-APPELLANTS,

vs.

HAROLD DONAHUE, d/b/a TOWN HOUSE, and RAYMOND DAHLBERG, d/b/a TRIANGLE INN,
DEFENDANTS-APPELLEES.

Abstract

Appeal from the Fourteenth Judicial Circuit, Rock Island County, Illinois

Honorable A.J. Scheineman, Presiding Judge.

STOUDER, J.

This cause comes to this court from an order of the Circuit Court of Rock Island County dismissing amendment to Appellant's complaint and a further order denying Appellant's motion to vacate the order dismissing the amendment.

On August 16, 1963, Appellants filed a complaint based on an alleged violation of the Dram Shop Act against both Appellees. On August 26 and August 29, 1963 Appellees filed their separate motions to dismiss on grounds that the complaint was not brought by the proper party plaintiff. On June 1, 1964 the motions were heard and an order entered allowing the motions with leave to Appellant to amend within ten days. On August 27, 1965, Appellants filed an amendment without further extension of time or leave of court. On August 30, 1965, Appellee Donahue filed a motion to dismiss the amendment which motion was granted on September 7, 1965, and on September 13, 1965 a like motion was filed by Appellee, Dahlberg and granted on the same day. Both motions were based on the amendment not having been timely filed. Appellants' alleged cause of action accrued on August 18, 1962.

Subsequent to the order granting Appellees' motions to dismiss the amendments,

Appellants filed a motion to vacate the orders of dismissal supported by the affidavit of Appellants' attorney. This affidavit stated that said attorney was not aware of the time limitation set forth in the order of June 1, 1964, that the docket entry of that date did not reflect a time limitation, that affiant did not remember any time limitation orally stated by the court, that he did not see the order as prepared nor was he furnished with a copy and that he was first made aware of said time limitation after filing his amendment.

Appellees' affidavit in resistance to the motion to vacate stated that the order of June 1, 1964 was prepared on that day and submitted to the court for signature, that the court would not have signed an order which did not conform to its ruling and of which opposing counsel was not aware, and that affiant believed Appellant to have been aware of the time limitation at the time of its imposition.

Appellant's argument on appeal is based solely on the doctrine of the relation back of the amendment to the original complaint in order to avoid the defense of the statute of limitations. We have no quarrel with Appellants' argument or authorities as an abstract proposition of law. However, while we are always happy with any attempt made to enlighten this court on such abstract propositions, we do not feel it to have any practical application to the instant case. The issue here, as we see it, is not whether the trial court was in error in its application of the legal principles concerning the sufficiency of the amendment, but whether the trial court abused its discretion in dismissing Appellants' amendment because it was not filed in conformity with the court's order. Appellants do not offer any argument on this point on appeal. The record does not disclose any contention on the part of Appellants that the trial court lacked authority to impose a time limitation on the filing of the amendment or even that the trial court did not do so but only that they were not aware of such limitation. Appellants' affidavit does not assert that the order as signed was not available to them for inspection and gives no reason for their failure to seek out the order for inspection nor any reason, even in the absence of a time limitation, for the

long delay in filing the amendment.

Chapter 110, Section 46, Ill. Rev. Stat. provides that "at any time before final judgment amendments may be allowed on just and reasonable terms, ...". We think it goes without saying that these "just and reasonable terms" may include the imposition of a time limitation within which the amendment must be filed. The statute clearly brings such matters within the discretion of the trial court and his decision will not be disturbed on appeal unless an abuse of that discretion is clearly and manifestly shown. Coatie v. Kidd 17 Ill. App. 2d 829, 149 N.E. 2d 646, Davidson v. Olivia 18 Ill. App. 2d 149, 151 N.E. 2d 345, Cook v. Ramsay 322 Ill. App. 671, 54 N.E. 2d 624. To hold on the basis of this record that there is an abuse of discretion would be to deny to the trial court the right to impose what it considers to be "just and reasonable terms."

Finding no error in the orders of the Circuit Court of Rock Island County such orders are hereby affirmed.

AFFIRMED.

Coryn, P.J. and
Alloy, J. concur.

No. 65-85

IN THE

APPELLATE COURT OF ILLINOIS

FIFTH DISTRICT

RONALD SCRIBNER,	)	
	)	
Defendant-Appellant,	)	Appeal From The
	)	Circuit Court of
-vs-	)	Christian County,
	)	Illinois.
THE PEOPLE OF THE STATE OF ILLINOIS,	)	
	)	
	)	
Plaintiff-Appellee.	)	

George J. Moran, J.

The defendant, Ronald Scribner, was tried by jury in the Circuit Court of Christian County, Illinois, and convicted of the crime of public indecency (S.H.A., Chapter 38, Paragraph 11-9, 1963). He was sentenced to serve a term of six months at the Illinois State Farm at Vandalia.

The appeal presents only one issue and that is whether the prosecution failed to prove a material element of crime of public indecency in that there was no evidence concerning the age of the appellant. In view of the narrow issue to be reviewed, a statement of the facts is not required.

[illegible]

[illegible]

[illegible]

[illegible]	[illegible]
[illegible]	[illegible]

[illegible]

[illegible] [illegible] of the crime of [illegible] (Chapter [illegible], Paragraph [illegible]) [illegible] a term of [illegible] [illegible].

The appeal presents [illegible] is whether the prosecution failed to [illegible] of public [illegible] evidence concerning the age of the [illegible] the narrow issue to be reviewed, [illegible] as here presented.

S.H.A. Chapter 38, Paragraph 11-9, 1963, provides in part that:

> Any person of the age of 17 years and upwards who performs any of the following acts in a public place commits a public indecency... (3) a lewd exposure of the body done with the intent to arouse or to satisfy the sexual desire of the person.

From a reading of the statute, the crime alleged to have been committed by the appellant consists of three essential elements: the age of 17 years and upwards, the performance of a specified act with a specific intent, and performance in a public place.

In support of his position that the failure to prove the essential element of age requires a reversal of his conviction, the appellant relies on Wistrand v. People, 213 Ill 72, wherein the court emphasized that:

> It was as essential to prove his age as it was to establish the age of the female, or to show that fornication occurred. Either of these three elements lacking, the corpus delicti is not established. Consequently, there should be evidence tending to establish each of these three necessary facts, aside from the confession of the defendant. 213 Ill at 79-80.

The court also found that "the law does not allow the jury to fix his age by inspecting his person." 213 Ill at 80. The same decision was reached in a more recent case, People v. Rogers, 415 Ill 343.

The appellant also relies upon People v. Stolfo, 32 Ill App 2d 340, in which only an abstract appears. The case held that the failure to state the defendant's age was not fatal to a conviction for public indecency where evidence showed that the defendant was married, had two children, and had worked in the exterminating business for over four years.

In the present case, there was no evidence introduced which might tend to establish the age of the appellant. The People have failed to prove an essential element of the crime of public indecency and, therefore, the judgment must be reversed.

For the foregoing reasons, the judgment in this case is reversed.

Judgment reversed.

CONCUR:

Honorable Joseph H. Goldenhersh

Honorable Edward C. Eberspacher

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